

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEFFREY M. GOEKEN,

Plaintiff,

vs.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

8:18CV320

ORDER

This matter is before the Court on the Court's own motion. On December 6, 2018, Plaintiff Jeffrey M. Goeken filed a Motion for an Order Reversing the Commissioner's Decision, ECF No. 17. On January 4, 2019, Defendant Nancy A. Berryhill filed a Motion to Affirm Commissioner's Decision, ECF No. 20. One of Goeken's arguments is that the administrative law judge ("ALJ") who decided his case was an inferior officer not appointed in accordance with the Appointments Clause and, thus, the ALJ's decision should be vacated and the case remanded for a decision by a new constitutionally appointed ALJ. Pl. Br., ECF No. 18, Page ID 484. Defendant argues that because Goeken did not raise the issue at any point during the administrative process, either before the ALJ or Appeals Council, he has waived his Appointments Clause challenge. Def. Br., ECF No. 21, Page ID 505. Goeken argues that his Appointments Clause challenge may be timely presented for the first time on appeal, and that even if it is found to be untimely, the Court should exercise discretion to hear the challenge pursuant to *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991).

In *Thurman v. Comm'r*, No. 1:17-cv-35-LRR, 2018 WL 4300504, at *9 (N.D. Iowa Sept. 10, 2018), Thurman, like Goeken, “did not present her Appointments Clause challenge to the ALJ or the Appeals Council.” *Id.* The United States District Court for the Northern District of Iowa concluded that “Thurman’s Appointments Clause argument [was] waived.” *Id.* Thurman appealed, and two of the issues this Court is being asked to decide in this case are presently before the Eighth Circuit Court of Appeals in *Thurman v. Comm'r*, No. 18-3451 (8th Cir. appeal docketed November 19, 2018). Therefore, this Court finds that this matter should be held in abeyance pending a decision by the Eighth Circuit Court of Appeals in *Thurman v. Comm'r*, No. 18-3451.

Accordingly,

IT IS SO ORDERED:

1. The decision on Plaintiff’s Motion for an Order Reversing the Commissioner’s Decision, ECF No. 17, and Defendant’s Motion to Affirm Commissioner’s Decision ECF No. 20, will be held in abeyance pending the decision of the Eighth Circuit Court of Appeals in *Thurman v. Comm'r*, No. 18-3451; and
2. Plaintiff shall notify the Court of the decision of the Eighth Circuit Court of Appeals in *Thurman v. Comm'r*, No. 18-3451, within 14 days of the decision. Upon such notification, the Court will enter an order lifting the stay and render a decision on the motions pending before this Court, ECF Nos. 17, 20.

Dated this 11th day of July, 2019.

BY THE COURT:

s/Laurie Smith Camp
Senior United States District Judge